RAPHAEL PURA

v.

INSAS BHD & ORS

FEDERAL COURT, KUALA LUMPUR
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL MALEK AHMAD FCJ
ABDUL HAMID MOHAMAD JCA
[CIVIL APPEAL NO: 02-6-2001(W)]
17 DECEMBER 2002

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Appellate jurisdiction - Appeal for leave granted - Whether question posed fell outside of ambit of issues raised in courts below - Whether court seised with jurisdiction to grant leave to hear appeal - Courts of Judicature Act 1964, s. 96(a)*

The plaintiffs had commenced an action, seeking damages for libel and slander, against the defendant in relation to an article published in a magazine. Before the trial commenced, the defendant applied to the trial judge to amend his defence on three occasions but these were refused on the ground of delay. After the third attempt failed, the defendant appealed to the Court of Appeal which however upheld the trial judge's decision and stated that the application lacked *bona fides*. The defendant proceeded to seek leave from the Federal Court to appeal thereto. The Federal Court granted the defendant's application and it sought to consider the proper test the court should apply in defamation cases where application for amendments were made to include a plea of justification in the defence when the evidence relating to the particulars were discovered after the pleadings were closed.

Before the appeal was heard, the plaintiffs raised the following preliminary objections:

i) the question/issue for which leave was granted was not one that arose or was decided by the High Court in the exercise of its original jurisdiction and/or by the Court of Appeal;

ii) consequently, the Federal Court did not have the jurisdiction to grant leave. Accordingly, the leave granted should be withdrawn/set aside and/or the aforesaid appeal should be dismissed;

iii) the question for which leave was granted was hypothetical and/or academic; and

iv) consequently, the Federal Court should decline to answer the question and the aforesaid appeal ought to be dismissed.

Held:

Per Abdul Malek Ahmad FCJ (dissenting)

[1] As the issue at hand was whether amendments could be made to a statement of defence after the pleadings have closed on a plea of justification on particulars not discovered earlier, the plaintiffs' preliminary objection was devoid of merit as the High Court and the Court of Appeal had considered those very issues and the same question had been framed by this court. Thus, the conditions of s. 96(a) of the Courts of Judicature Act 1964 had been satisfied. (pp 70 h-i & 71 a)

[2] This was in fact a defamation case and the proposed amendments were to include a plea of justification particularising the details. The pleadings had in fact closed almost three years earlier. And, indeed some of the details could only be so particularised after the pleadings were closed. The other particulars had been included in an earlier suit. Thus, in the circumstances, the question posed was proper and the preliminary objection should fail. (p 74 b-c)

[3] The question posed was part of a series of questions posed by the leave panel. It would have been better if the leave panel had agreed to all the questions posed as the drift of the actual question framed with the sole intention of summarising the situation at hand. The statement of defence was sought to be amended after the pleadings were closed to include a plea of justification. The particulars involved facts already disclosed, in other parts of the original statement of defence and in an earlier suit between the same parties on a similar matter, while other particulars had to be verified before the particularised plea of justification could be put in. The question framed was made more necessary by the somewhat unfriendly attitude of the learned trial judge in handling the matter and the ill-considered finding of the Court of Appeal that the delay was a sure sign of *mala fide*. (p 85 d-e)

[4] Having examined the statement of defence as it was and the proposed amendments, there was nothing to prove that the plaintiffs would suffer injustice or why those amendments should be disallowed. Should the

defendant fail to prove the particulars in the proposed amended statement of defence, then an order of aggravated damages ought to be made against him. (p 85 f-g)

[Preliminary objection overruled; appeal allowed; defendant to pay plaintiffs' cost on amendments.]

Per Abdul Hamid Mohamad JCA (majority)

[1] Generally, where the Federal Court has granted leave to appeal, it is not open to the party to re-litigate this issue. It is *res judicata*. In the interest of consistency, a new panel of this court should not be reversing the decision of the earlier panel of the same court. However, where the granting of the leave is challenged on the ground of lack of jurisdiction, then this may still be challenged even at the hearing of the appeal. (p 96 d-e)

[2] The defendant's main purpose to amend his defence was to separate the roll-up plea of justification and fair comment. The question posed by the Federal Court did not reflect the issues discussed by the High Court and the Court of Appeal in dismissing the defendant's application to amend his defence. Instead, it related to the test applicable where evidence relating to the particulars were discovered after the pleadings were closed. Based on the Federal Court's decision in *The Minister for Human Resources*, this court should decline to answer the question posed. (p 99 c-e)

[3] The question posed did not relate to the facts of the case and was therefore rendered academic. Based on the defendant's own affidavit, it was clear that the particulars were not discovered after the pleadings were closed. (pp 99 f & 100 h)

[4] The defendant did not come to this court to know what the law is in this country on a hypothetical issue. He sought for the proposed amendments to be admitted. However, this court would not be able to grant the order sought by the defendant as the facts of the case were materially different from the facts that formed the basis of the answer to the posed question. (p 102 a-b)

[Preliminary objection allowed; appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Pihak plaintif telah memulakan suatu tindakan, bagi mendapatkan pampasan untuk libel dan slander, terhadap defendan berkenaan suatu artikel yang telah diterbitkan dalam suatu majalah. Sebelum perbicaraan dimulakan, defendan telah memohon tiga kali kepada hakim perbicaraan untuk membuat pindaan

kepada penyata pembelaannya tetapi ianya telah ditolak atas alasan kelengahan. Selepas percubaan ketiganya gagal, defendan telah membuat rayuan ke Mahkamah Rayuan yang sebaliknya telah mengesahkan keputusan hakim perbicaraan dan menyatakan bahawa permohonan tersebut berkurangan *bona fides*. Defendan menuju ke Mahkamah Persekutuan untuk mendapatkan kebenaran merayu kepadanya. Mahkamah Persekutuan telah membenarkan permohonan defendan dan ia mengimbang ujian yang patut dipakai oleh mahkamah dalam kes-kes fitnah di mana permohonan untuk pindaan dibuat untuk suatu akuan justifikasi dalam pembelaan bilamana bukti berkenaan dengan butir-butir ditemui selepas pliding ditutup.

Sebelum rayuan tersebut dibicarakan, pihak plaintif telah mengutarakan bantahan-bantahan awal berkenaan:

i) soalan/isu dimana kebenaran diberikan adalah bukan suatu yang timbul atau telah diputuskan oleh Mahkamah Tinggi dalam menjalankan bidangkuasa asalnya dan/atau oleh Mahkamah Rayuan;

ii) oleh yang demikian, Mahkamah Persekutuan tidak mempunyai bidangkuasa untuk memberi kebenaran. Berikutan ini, kebenaran yang diberikan patut ditarikbalik/diketepikan dan/atau rayuan yang dimaksudkan sebelum ini harus ditolak;

iii) soalan yang mana kebenaran diberikan adalah andaian dan/atau akademik; dan

iv) oleh yang demikian, Mahkamah Persekutuan harus menolak untuk menjawab soalan tersebut dan rayuan yang dimaksudkan sebelum ini harus ditolak.

Diputuskan:
Oleh Abdul Malek Ahmad HMP (menentang)

[1] Oleh kerana isu semasa adalah sama ada pindaan boleh dibuat kepada penyataan pembelaan selepas pliding ditutup diatas suatu akuan justifikasi terhadap bukti-bukti yang tidak dizahirkan sebelum ini, bantahan awal pihak plaintif tidak mempunyai merit kerana Mahkamah Tinggi dan Mahkamah Rayuan telah menimbangkan isu-isu tersebut dan soalan yang sama telahpun dibentuk oleh mahkamah ini. Maka, syarat-syarat s. 96(a) Akta Mahkamah Kehakiman 1964 telahpun dipenuhi.

[2] Ini pada zahirnya adalah suatu kes fitnah dan pindaan yang diusulkan adalah untuk memasukkan akuan justifikasi menjelaskan butir-butir. Sememangnya, pliding-pliding telah ditutup hampir tiga tahun sebelum ini.

Dan, malah beberapa butiran hanya boleh dijelaskan sebegitu selepas pliding ditutup. Butir-butir yang lain telahpun dimasukkan dalam perbicaraan sebelum ini. Maka, dalam keadaan sedemikian, soalan yang ditimbulkan adalah wajar dan bantahan awal seharusnya digagalkan.

[3] Soalan yang ditimbulkan adalah sebahagian daripada suatu siri soalan yang ditimbulkan oleh panel kebenaran. Mungkin lebih bagus sekiranya panel kebenaran telah bersetuju kepada kesemua soalan yang ditimbulkan sebagai biji butir pembentukan soalan sebenar, dengan niat utamanya untuk meringkaskan keadaan semasa. Penyataan pembelaan cuba dipinda selepas pliding ditutup untuk memasukkan akuan justifikasi. Butir-butir melibatkan fakta-fakta yang telahpun dibentangkan, di bahagian lain kenyataan pembelaan yang asal dan di dalam perbicaraan yang sebelum ini di antara pihak-pihak yang sama berkenaan perkara yang serupa, manakala butir-butir yang lain harus ditentusahkan sebelum pembutiran akuan justifikasi boleh dimasukkan. Soalan yang dibentukkan sememangnya dititikberatkan dengan adanya sikap hakim perbicaraan yang agak tidak begitu baik dalam mengendalikan hal tersebut dan keputusan tidak tepat Mahkamah Rayuan bahawa kelengahan sememangnya menandakan *mala fide*.

[4] Setelah meneliti penyata pembelaan seperti keadaan asalnya dan pindaan yang diusulkan, tidak terdapat apa-apa untuk membuktikan yang pihak plaintif akan mengalami ketakadilan atau kenapa pindaan tersebut tidak patut dibenarkan. Sekiranya defendan gagal untuk membuktikan butir-butir dalam usul pindaan kepada penyataan pembelaannya, maka suatu perintah untuk gantirugi tertambah harus dibuat terhadapnya.

[Bantahan awal ditolak; rayuan dibenarkan; defendan diarahkan membayar pihak plaintif kos atas pindaan.]

Oleh Abdul Hamid Mohamad HMR (majoriti)

[1] Pada amnya, dimana Mahkamah Persekutuan telah memberi kebenaran untuk membuat rayuan, ia tidak terbuka kepada suatu pihak untuk melitigasikan semula isu ini. Ia adalah *res judicata*. Dalam kepentingan ketekalan, suatu panel yang baru mahkamah ini tidak harus mengakaskan keputusan panel sebelum ini dari mahkamah yang sama. Akan tetapi, di mana pemberian kebenaran dicabar atas alasan kekurangan bidangkuasa, maka ini masih boleh dicabar walaupun pada masa rayuan ini dibicarakan.

[2] Tujuan utama defendan meminda pembelaannya adalah untuk mengasingkan akuan "roll-up" justifikasi dan komen berpatutan. Soalan yang ditimbulkan oleh Mahkamah Persekutuan tidak membayangkan isu-

isu yang dibicarakan oleh Mahkamah Tinggi dan Mahkamah Rayuan dalam menolak permohonan meminda pembelaannya. Sebaliknya, ia bersangkut-paut dengan ujian yang terpakai di mana bukti berkenaan dengan butir-butir ditemui selepas pliding ditutup. Berdasarkan keputusan Mahkamah Persekutuan dalam *The Minister for Human Resources*, mahkamah ini seharusnya menolak menjawab soalan yang ditimbulkan.

[3] Soalan yang ditimbulkan tidak merujuk kepada fakta-fakta kes tersebut dan oleh itu menyebabkannya menjadi akademik. Berdasarkan kepada afidavit defendan sendiri, adalah jelas bahawa butir-butir tidak dizahirkan selepas pliding ditutup.

[4] Defendan tidak datang ke mahkamah ini untuk memaklumkan undang-undang di negara atas isu andaian. Beliau memohon untuk usul pindaannya diterima. Walau bagaimanapun, mahkamah ini tidak boleh membenarkan permohonan yang dikehendaki oleh defendan kerana terdapat perbezaan ketara antara fakta kes dengan fakta yang membentuk asas kepada soalan yang ditimbulkan.

Bantahan awal dibenarkan; rayuan ditolak dengan kos.]

Case(s) referred to:

Ainsbury v. Millington [1987] 1 All ER 929 ***(refd)***

Associated Leisure Ltd & Ors v. Associated Newspapers Ltd [1970] 2 All ER 754 ***(refd)***

Atkinson v. Fitzwalter & Ors [1987] 1 All ER 483 ***(refd)***

Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors [1995] 3 CLJ 485 ***(refd)***

Capital Insurance Bhd v. Aishah Abdul Manap & Anor [2000] 4 CLJ 1 ***(dist)***

Christopher Neville Williams v. Mirror Group Newspapers (1986) Ltd ***(refd)***

Kiam v. MGN Ltd (No 2) [2002] EWCA Civ 66 ***(refd)***

Lam Kong Company Ltd v. Thong Guan Co Pte Ltd [2000] 4 CLJ 769 ***(dist)***

Loknath Padhan v. Birendra Kumar Sahu [1974] AIR 505 ***(refd)***

Lucas-Box v. News Group Newspaper Ltd; Same v. Associated Newspapers Group PLC & Ors [1986] 1 WLR 147 ***(refd)***

Lownds v. Home Office [2002] EWCA Civ 365 ***(refd)***

McDonald's Corp & Anor v. Steel & Anor [1995] 3 All ER 615 ***(refd)***

McPhilemy v. Times Newspapers Ltd & Ors [1999] 3 All ER 775 ***(refd)***

Megat Najmuddin Dato Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645; [2002] CLJ JT(2) ***(dist)***

Sun Life Assurance Company & Canada and Jervis (1994) The Law Reports Appeal Cases, p 111 ***(refd)***

Sutherland & Ors v. Stopes [1925] AC 47 ***(refd)***

Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors And Another Application [1999] 1 CLJ 325 ***(refd)***

The Minister of Human Resources v. Thong Chin Yoong & Another Appeal [2001] 3 CLJ 933 ***(foll)***

Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 ***(refd)***

Wright Norman & Anor v. Oversea-Chinese Banking Corp Ltd [1994] 1 SLR 513 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3(1)
Courts of Judicature Act 1964, ss. 68(1)(a), 96(a)
Industrial Relations Act 1967, s. 20(3)
Rules of the Court of Appeal 1994, rr. 18(4)(d), (7)
Rules of the High Court 1980, O. 18 r. 20, O. 20 r. 5(5)

For the appellant - Geoffrey R Robertson (Dato' Muhammad Shafee Abdullah, Leena Ghosh & Rishwant Singh); M/s Shafee & Co

For the respondents - V Sithambaram (Dato' V Sivaparanjothi, R Thayalan & Wong Kee Them); M/s Siva & Partners

[Appeal from Court of Appeal, Civil Suit No: W-02-720-1999]

Reported by M Maheswaran

JUDGMENT

Abdul Malek Ahmad FCJ:

I have read the judgment in draft of my learned brother Abdul Hamid Mohamad JCA and entirely agree with his findings relating to the withdrawal of, and costs to be paid on, the notice of motion to set aside the order of this court on 28 March 2001 granting leave to appeal. I also fully endorse the manner he detailed the background of the case. However, despite his somewhat persuasive stance in dealing with the appeal, I find it difficult to come to the same conclusion as he did since he had declined to answer the question posed and had dismissed this appeal without even considering the merits. In other words, he had allowed the preliminary objection of the respondents.

Learned counsel for the respondents Dato' V. Sivaparanjothi raised the preliminary objection at the outset based on their letter dated 7 May 2002. The four issues raised were:

(a) the question/issue for which leave was granted is not a matter/issue that arose or was decided by the High Court in the exercise of its original jurisdiction and/or by the Court of Appeal;

(b) consequently, the Federal Court did not have jurisdiction to grant leave. Accordingly, the leave granted should be withdrawn/set aside and/or the aforesaid appeal ought to be dismissed;

(c) the question for which leave was granted is hypothetical and/or academic; and

(d) consequently, the Federal Court should decline to answer the question and the aforesaid appeal ought to be dismissed.

He conceded that these issues were not raised at the leave application hearing but added that they could be taken at any stage. He cited *Capital Insurance Bhd v. Aishah bte Abdul Manap & Anor* [2000] 4 CLJ 1, where this court held that since the preliminary objection related to the question of jurisdiction of the Federal Court to hear appeals from the Court of Appeal, and noting that at the leave stage the preliminary objection taken by the respondents that the leave application was improper was summarily dismissed by the court, the respondents were entitled to raise this preliminary objection and the court could entertain the application.

At p. 5 of that case report, Mohamed Dzaiddin FCJ, as he then was, said:

> There is however one interesting point which deserves our consideration. From the chronology of events, on 17 February 2000 an application for leave to appeal against the Court of Appeal decision was granted by this court in which I sat as a panel member. A preliminary objection taken by the respondents that the application was improper was summarily dismissed by the court. In view of leave to appeal having been granted earlier by this court, can the respondents raise here a preliminary objection that this court has no jurisdiction to hear the appeal?

At p. 6, he continued:

> In our view, there is much force in the submission. Since the preliminary objection relates to the question of jurisdiction of the Federal Court to hear appeals from the Court of Appeal, and noting that at the leave stage the preliminary objection taken by the respondents that the leave application was improper and summarily dismissed by this court, the respondents are entitled to raise this preliminary objection and this court can entertain the application.

Learned counsel reiterated that the particulars the appellant intended to put in his proposed amended statement of defence had already been pleaded. The purpose was just to derail proceedings, he added, as the discovery of particulars after the pleadings had closed was never raised in the High Court or in the Court of Appeal.

When my learned brother Steve Shim Lip Kiong CJ (Sabah and Sarawak) as presiding judge interjected to say that all these arguments could be dealt with in the appeal proper, learned counsel agreed. However, at that point of time, I was already aware that the facts in the *Capital Insurance* case were

distinguishable as there the Court of Appeal dealt only with the preliminary objection on the point that the appeal record was defective for non-compliance with rr. 18(4)(d) and 18(7) of the Rules of the Court of Appeal 1994 (hereinafter "the RCA") and the merits were never heard at that stage. Here, however, the merits were heard both in the High Court and the Court of Appeal and obviously the preliminary objection cannot stand. This distinguishing feature is supported by the fact that coincidentally, the learned Chief Justice, who wrote the judgment in the *Capital Insurance* case, presided on the panel that framed the leave question in this appeal.

In essence, the leave question had been framed following arguments by the parties at the leave stage and to say the question is hypothetical or academic in effect suggests that by so granting leave we were actually going on a frolic of our own.

This court had granted the appellant leave to appeal on 28 March 2001 on the following question:

> What is the proper test the Court should apply in defamation cases where (the) application for amendments are made to include a plea of justification in the defence where the evidence relating to these particulars are discovered after the Pleading(s) are closed?

It is not disputed that the trial had been fixed for 1 September and 6 to 8 September 1999. The appellant, after pleadings had been closed in October 1996, filed three applications to amend the statement of defence.

The first was on 14 August 1999 which was subsequently withdrawn as it was not supported by any affidavit. Further, there were other minor amendments to be inserted.

The second was filed on 21 August 1999 duly supported by an affidavit. This was fixed for hearing on 1 September 1999 at 2.30pm. In the meantime, the appellant had made an application to disqualify the trial judge from hearing the matter on the grounds of bias as he had prejudged the issues in other judgments on related matters. This application was dismissed on 30 August 1999.

On 1 September 1999 itself, the appellant filed a summons in chambers to correct certain errors in the second application to amend his statement of defence. The second application and the summons in chambers were heard together and the judge dismissed the summons in chambers with costs as it was not supported by any affidavit and after refusing an oral application to so amend, the second application to amend the statement of defence was also dismissed with costs because of the errors contained therein as the application to correct them had been refused.

The third application to amend the statement of defence was filed on 3 September 1999 and was fixed on 6 September 1999, the date already set for the trial to proceed. An application to adjourn the trial to hear this application was refused. The trial proceeded but on the next day, while the respondents' third witness was under cross-examination, it became apparent to the trial judge that the third application to amend the statement of defence should be heard before the trial continued.

This was heard the next morning. The trial judge, after overruling the preliminary objections of learned counsel for the respondents, directed learned counsel for the appellant to address him on five issues namely:

(a) the delay in filing the application;

(b) if the documents were kept overseas, is not this caught by the Official Secrets Act 1972?

(c) the admission by the appellant that no fresh evidence is being adduced;

(d) if already raised in a previous suit, why not have this raised earlier?

(e) no exhibits to back up affidavit.

The trial judge was only interested in these five issues and refused to read the learned counsel's prepared written submissions or to listen to his oral submissions on other aspects. He was more concerned whether there were exhibits attached to the affidavit in support.

Learned counsel for the appellant promised to produce them at the trial submitting there was no necessity to exhibit them in an application to amend the statement of defence. In any case, they were already in bundle CABD3 to which the judge refused to refer. The judge then proceeded to dismiss the application. Relying on the arguments on the issues, he stated that the application lacked *bona fides*.

Learned counsel for the respondents' contention was that the appellant's proposed amended statement of defence was not fresh evidence but documentary evidence to support what had already been pleaded and that the particularisation had already been pleaded in a previous suit involving the respondents. This runs counter to the question posed, according to learned counsel, as it is trite that the question posed must be a question from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction.

My immediate reaction was that, as the issue at hand was whether amendments can be made to a statement of defence after the pleadings have closed on a plea of justification on particulars not discovered earlier, this submission was

totally devoid of merit as the High Court had decided on that very issue, the Court of Appeal had considered the very matter on appeal, the same question had been framed by this court and the conditions of s. 96(a) of the CJA had been satisfied.

Just two months before the *Capital Insurance* case, *Lam Kong Company Ltd v. Thong Guan Co Pte Ltd* [2000] 4 CLJ 769 was decided. There, the applicant had earlier filed an appeal to the Court of Appeal without leave in respect of a subject matter which was less than RM250,000. The Court of Appeal allowed the respondent's motion to strike out the appeal. The applicant appealed to the Federal Court against that decision. The respondent raised the preliminary objection that the application was misconceived because it was founded on the decision of the Court of Appeal under s. 68(1)(a) of the Courts of Judicature Act 1964 (hereinafter "the CJA") and not from its judgment or order in respect of a civil cause or matter decided by the High Court in the exercise of its original jurisdiction within the meaning of s. 96(a) of the CJA.

Mohamed Dzaiddin FCJ, as he then was, in a majority judgment at pp. 784 and 785 had stated:

> It would seem clear to us that the legal authority to decide whether leave is required or not under s. 68(a) of the Act is the Court of Appeal and therefore it follows that the decision of the Court of Appeal is final. To hold otherwise would lead to absurdity and defeat the "filter" principle unless an appeal from it is expressly given ...
>
> So a question that arises is whether the instant application for leave to appeal is from the judgment or order of the Court of Appeal in respect of a civil cause or matter decided by the High Court. Clearly, the application is founded on the judgment of the Court of Appeal in a pending appeal made on an application by the respondent to strike out the applicant's notice of appeal on the ground that it was filed without leave of the Court of Appeal as required by s. 68(1)(a) of the Act. In short, the instant application is not against the judgment of the Court of Appeal in respect of a civil cause or matter decided by the High Court on the merits.

Five years earlier, in *Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors* [1995] 3 CLJ 485, the High Court gave its judgment in favour of the plaintiffs. The defendant was dissatisfied. As the value of the subject matter was less than RM250,000, the defendant applied to the Court of Appeal for leave to appeal before filing its appeal, pursuant to s. 68(1)(a) of the CJA. However, its application was refused. The defendant then relied on s. 96(a) of the CJA, and applied for leave to appeal against the refusal in the Federal Court. The question of law which arose was whether the power to give leave to appeal was confined exclusively to the Court of Appeal. In deciding the question,

the court had to consider whether the refusal of leave by the Court of Appeal was a judgment or order within s. 96(a) of the CJA, so as to enable the Federal Court to entertain the application.

Lamin PCA held that this case was in the nature of an application to the Federal Court for leave to appeal to the Court of Appeal. If an appeal is to be lodged in the Court of Appeal in the circumstances falling within the terms of s. 68(1)(a) of the CJA, leave must first be obtained from the same court. Likewise, s. 96(a) of the CJA dictates that before a notice of appeal can be filed in the Federal Court, its leave must first be obtained. The Federal Court has no power to grant leave for the purpose of lodging an appeal in the Court of Appeal.

Edgar Joseph Jr FCJ said that as both the court and right of appeal therefore are creatures of statute, no appeal lies unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal. In this case, there is no such provision. The exercise of a discretion to grant or refuse leave to appeal is not a judgment or order within the meaning of s. 96(a) of the CJA.

In *The Minister of Human Resources v. Thong Chin Yoong and Another Appeal* [2001] 3 CLJ 933, the High Court issued an order of *certiorari* to quash the decision of the Minister made under s. 20(3) of the Industrial Relations Act 1967 (hereinafter "the IRA") declining to refer the representations of the claimant to the Industrial Court for an award as well as an order of *mandamus* directing the Minister to refer the representations to the Industrial Court. The High Court held that the Minister erred in the exercise of his discretion under s. 20(3) of the IRA in declining to refer the representations of the claimant to the Industrial Court. The Court of Appeal upheld the decision of the High Court. The Federal Court granted leave to appeal and framed the following question for its determination: "Whether the employer can suspend an employee without loss of pay, benefits and perks pending the conclusion of the investigations and inquiries into his conduct notwithstanding that this is not stated in the terms of employment". The claimant raised a preliminary objection that the question as framed does not come within the meaning of s. 96(a) of the CJA and hence the appeal should be dismissed forthwith.

In allowing the preliminary objection, this court held that the Federal Court was asked to consider an issue which was not determined by the High Court as well as the Court of Appeal. To that extent, the proper order that the court should make would be to decline to answer the question. It is best that the issue of suspension be considered by the Industrial Court in determining whether the claimant was dismissed without just cause or excuse. In the

circumstances of the case, the court agreed with the preliminary objection that the question framed by this court for its determination did not come within the ambit of s. 96(a) of the CJA.

In *Megat Najmuddin Dato Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645; [2002] CLJ JT(2), the appeal arose as a result of the Court of Appeal's decision to dismiss the appellant's appeal therein on the defectiveness of the appeal record. The facts were that the appellant had appealed to the Court of Appeal against the decision of the learned judge of the High Court. The respondent raised a preliminary objection, that is, that the appellant had not complied with rr. 18(4)(d) and (7) of the RCA as the appeal record included only a photocopy of the sealed order appealed against, and the supplementary appeal record that incorporated a sealed copy of the order was filed out of time and without leave of court. The Court of Appeal upheld the preliminary objection and dismissed the appeal. The two questions before the Federal Court were:

(a) whether the Federal Court had jurisdiction to determine this appeal from the Court of Appeal as it did not originate from the High Court in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction; and

(b) whether there was compliance with rr. 18(4)(d) and (7) of the RCA when the appellant tendered the sealed copy of the order at the hearing before the Court of Appeal in open court in accordance with the Supreme Court Practice Direction No. 1 of 1992.

The majority judgment of this court held that the matter should be reheard by the Court of Appeal on the merits. In effect, we did not actually hear the merits of the appeal as the Court of Appeal had itself not heard the appeal on the merits.

The sum of all these decisions in *Auto Dunia* and *Lam Kong*, where leave was an issue before the Court of Appeal, in *Capital Insurance* and *Megat Najmuddin*, where defects in the appeal record resulted in a dismissal of the appeal by the Court of Appeal without the merits being heard, and in the *Minister of Human Resources*' case where the High Court and the Court of Appeal only decided on the error of the Minister's discretion in declining to refer the claimant's representations to the Industrial Court, is that this court will not grant leave or will not hear any appeal on the merits if the Court of Appeal had refused leave or had not heard the appeal on the merits against the decision of the High Court in the exercise of its original jurisdiction.

Now, is that the situation here? Obviously not, as the High Court and the Court of Appeal had in fact heard the matter and the appeal respectively on the merits.

Was the question wrongly framed? Like my learned brother Steve Shim Lip Kiong CJ (Sabah & Sarawak), I have the added advantage of having sat on the panel that granted leave. This is in fact a defamation case and the proposed amendments are to include a plea of justification with all the details particularised. The pleadings have in fact closed almost three years earlier. And indeed some of these details can only be so particularised after the pleadings are closed. The other particulars had been included in an earlier suit. Is there anything wrong with the question? The answer is certainly in the negative. The preliminary objection must fail.

It is the argument of learned counsel for the appellant that preventing the appellant from raising a plea of justification deprives the appellant the opportunity of establishing the truth of his statements, prevents issues which may be of public concern from being investigated in a court of law and may ultimately result in an artificial verdict in the event of the respondents succeeding on their claim enabling them to assert that their character is unblemished and their reputation vindicated, as a result of crucial evidence having been kept out of court. Conversely, he added, where the plea of publication is allowed to be raised but is not proven at the trial, there is a grave risk of that failure being reflected in higher damages being awarded.

In *Associated Leisure Ltd and Others v. Associated Newspapers Ltd* [1970] 2 All ER 754, the defence to the action, delivered promptly on 14 January 1969, simply denied that the words complained of were published of the plaintiffs or were defamatory of them. At the time the defence was delivered, the defendants were advised that there was insufficient evidence to plead justification; and it was not until March 1970, after further enquiries had been made, that they were advised that there was sufficient evidence to place a plea of justification on the record. On receiving that advice, the defendants applied for leave to amend the defence to plead justification, and also to plead fair comment. Their draft amendment contained over thirty paragraphs of particulars of justification. The plaintiffs resisted the application to amend.

It was held that the amendments would be allowed although it came at a late stage, because the defendants had observed the duty not to put a plea of justification on the record unless there was clear and sufficient evidence to support it. Applying well-settled principles, it was in the interests of justice that the allegations in the amendment and the reputation and character of the plaintiffs should be properly investigated and considered in the action provided the plaintiffs could be compensated for any hardship caused by the amendment,

which could be done in the present case by the award of increased damages if the plea of justification failed. The defendants had exercised all due diligence in their enquiries and had put in the plea of justification as soon as it could properly be done.

Similarly, in *Atkinson v. Fitzwalter and Others* [1987] 1 All ER 483, the plaintiff, a dentist, brought a libel action against the defendants in respect of comments contained in a television programme edited by the first defendant and transmitted by the second defendant. The plaintiff claimed the comments were defamatory of him. The writ was served on 9 August 1984 and a defence in the form of a simple denial was served on 16 October 1984. By 11 September 1985, an amended defence pleading justification was ready, but the defendants' solicitor mistakenly believed that the action had become dormant and no attempt was made to put in an amended defence until 16 April 1986, when the defendants successfully applied to the judge to stand the case out of the trial list and for leave to amend their defence to plead justification. The plaintiff appealed.

It was held that the general principle to be applied in considering an amendment, however late, was that it should be allowed if justice required it, provided the other party could be monetarily compensated for any inconvenience, and the fact that the amendment alleged fraud was not of itself reason to refuse to allow it to be made. On the facts, if the allegation of fraudulent conduct was true, it ought to be investigated at the trial of the action, while any hardship caused to the plaintiff could be compensated for by the award of increased damages if the defence of justification failed. However, because so many of the particulars in the plea of justification did not support the allegation of fraud, the proposed amendment would be struck out but without prejudice to the defendants' right to make a further application for leave to amend. On that basis, the appeal was allowed.

In *McPhilemy v. Times Newspapers Limited & Others* [1999] 3 All ER 775, the plaintiff commenced proceedings for defamation against the defendants who pleaded justification. After discovery, the defendants applied to reamend the particulars of justification, so as to add extensive particulars challenging the existence of the alleged conspiracy. The judge allowed the amendment, and the plaintiff appealed.

It was decided that like all actions, libel actions should be confined, by proper case management, within manageable and economic bounds, and they should not be allowed to descend into uncontrolled and wide-ranging investigations akin to public inquiries unless that was necessary to determine the real issue between the parties. Furthermore, the court would strive to manage a case so as to minimise the burden on litigants of slender means, and would exclude

all peripheral material which was not essential to the just determination of the real issues between the parties. In the instant case, the truth of the programme's main thesis had been part of the battleground in the proceedings from the start, and the court would not exclude potentially important evidence which was central to a legitimate defence. Accordingly, the appeal was dismissed.

In the unreported case of *Christopher Neville Williams v. Mirror Group Newspapers (1986) Limited* decided on 4 August 1989, pp. 10 and 11 of the report reads as follows:

> However, it is a fact that here is an application to amend the defence made the day after the defendants received a summons by the plaintiff to strike out, and many months after the case has been set down and when it is in the warned list. So delay is amply made out. There is an affidavit as to the various inquiries which the defendants say they had to make. In my view, that affidavit does not come within a mile of explaining or excusing delay which I find was inordinate.
>
> I have taken some time to deal with this aspect of the application because I am well familiar, for it is often and proper cited in these applications, with the case of *Associated Leisure (Phonographic Equipment Co) v. Associated Newspapers* [1970] 2 QB 450, with the classical words used by Lord Justice Bowen in the case last century of *Cropper v. Smith*, and with the observations in *Associated Leisure v. Associated Newspapers* of Lord Justice Edmund Davies and the then Master of the Rolls, Lord Denning, from which it is plain that delay, it itself, was regarded by the Court of Appeal as something which, if I may use my own words, would by no means necessarily prevent a defendant from amending, and unless there was prejudice, fraud, over-reaching or lack of due diligence to a very considerable degree on the part of the defendant, and, as long as the plaintiff could be compensated in money, delay should not prevent an amendment from being allowed. I do not, of course, cast the slightest doubt upon the views expressed in those cases and referred to again in the case of *Atkinson v. Fitzwalter* [1987] AELR 483.

In *McDonald's Corp and Another v. Steel and Another* [1995] 3 All ER 615, the Court of Appeal in allowing the appeal held that a plea of justification to a libel action was not required to be supported by "clear and sufficient evidence" before being properly placed on the record, since that threshold test, if applied literally, would impose an unfair and unrealistic burden on a defendant whose plea was properly particularised but who was entitled to seek support for his case from documents revealed in the course of discovery or from answers to interrogatories. Nevertheless, before pleading justification, a defendant should believe that the words complained of were true, intend to support the defence at trial and have reasonable evidence to support the plea or reasonable grounds to suppose that sufficient evidence to prove the allegations would be available at trial.

The landmark decision locally as regards the amendment of pleadings after they have closed is *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd. & Ors.* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 where after the pleadings were closed, the appellants applied for leave to amend the amended statement of claim. The application was dismissed by the learned judge and the appellants appealed to the Federal Court.

It was held that the general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result:

(a) whether the application was *bona fide*;

(b) whether the prejudice caused to the other side can be compensated by costs; and

(c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

On the facts of that case, even if the allegation of fraud can be held to constitute a new cause of action, the amendment would be allowed under O. 20 r. 5(5) of the Rules of the High Court 1980 as it arises out of the same facts or substantially the same facts as the original cause of action in which the relief had already been claimed by the appellants in the original pleading. The court should in the exercise of its discretion allow the amendment even if it had the effect of introducing a plea of fraud for the first time on the ground that the amendment would not only be in the interest of justice but also for the purpose of determining the real questions in controversy between the parties.

The reasoning of the Court of Appeal that in applying the principles in the *Yamaha* case in the context of the present case found that the application lacked *bona fides* by reason of insufficiently explained delay in making the application was strongly attacked by learned counsel for the appellant who submitted that the Court of Appeal failed to appreciate that the three criteria in the *Yamaha* case was merely meant to provide evidence to the court when assessing injustice and as such, lost sight of or failed to apply the broad definition of justice or the overall interest of justice test expounded in the *Associated Leisure Ltd* case.

Learned counsel for the appellant advanced two propositions namely:

(a) the general rule in Malaysia is that a late amendment should be permitted if it is made *'bona fide'*. That is to say, for the purposes of allowing the court to do justice between the parties by determining the real issue in controversy between them, so long as any prejudice can be compensated by an order of costs, including costs thrown away by any consequent adjournment;

(b) in defamation cases, there is a presumption that a late amendment adding or particularizing a plea of justification, including particulars based on evidence discovered or confirmed after pleadings had closed, is *bona fide* and should be allowed if it assists the Court to determine the truth of the defamatory imputations.

In relation to both propositions, the burden of establishing that a late amendment is *'mala fide'* is on the party which makes this allegation. The fact that the application has been attended by delay or by legal bungling cannot be definitive; the real question is whether the actual particulars applied for are relevant to prove the truth of the imputations.

In this case, the defamatory words say that "The ultimate fear about *Ayer Molek* and all of these cases is that they mean ...". The respondents allege the meaning is that they connived at their lawyer's attempts to corrupt the Malaysian judiciary; the appellant contends the meaning to be that the respondents' lawyer has contributed to a falling reputation of Malaysian justice.

In respect of either defamatory meaning, the new particulars of justification show, if the appellant proves them, that the respondents' lawyer, *inter alia*,

(a) was found to have abused the process of the Court in the *Ayer Molek* litigation, such findings not having been "expunged" by an unconstitutional Federal Court decision;

(b) improperly placed the then Chief Justice, who presided over the *Ayer Molek* hearing in the Federal Court, in his debt;

(c) improperly contributed to the writing of the judgment in the Vincent Tan case.

These facts are highly relevant, since they go to prove the truth of the defamatory imputations and for that reason cannot be advanced *mala fide.*

That there is a reasonable evidential basis for pleading them is substantiated by the existence of:

(a) the Court of Appeal decision in *Ayer Molek*;

(b) CABD3, an agreed bundle which was part of the material before the trial judge although he decided not to look at it. The Court of Appeal disallowed an application to introduce it, thereby falling into error in thinking and stating that there was no such material before the trial judge. Since the whole case is before this court, it is entitled, in applying the proper test for late amendments to the facts of this case, to consider the fact that this evidential material was in fact before the trial judge whose failure to appreciate it meant that his discretion miscarried;

(c) the draft judgment in the respondents' lawyer's handwriting, delivered in the *Vincent Tan* case.

The respondents' complaint is essentially that they have been tarnished by a false imputation against their lawyer. Because of the special privileges given to lawyers in the courts, it is very much in the public interest and in the interest of the lawyer concerned to have the truth of the imputation decided authoritatively by the courts. If the amendments are not allowed, there is a grave danger of a "false vindication". In so far as the delay in making the application requires explanation, it has been given by the appellant, namely the duty to act cautiously and responsibly before putting on such a pleading and the need in this case to confirm that the apparently incriminating documents, floppy disks and photographs were not fabricated, which could only be done at a late stage. The respondents' lawyers were served with the new pleading three weeks before the trial; their affidavit gives no specific example of any prejudice they would suffer should the amendments be allowed, and certainly no prejudice that could not be compensated by costs or, if the defence is not made out, by an award of aggravated damages.

The qualified privilege plea should also have been allowed since the amendments to it were based upon developments, since the pleadings had closed, in the common law made by court decisions in England and Australia. That these developments now reflect the common law of Malaysia is plainly arguable, and on that basis the amendment should have been allowed. It is obviously just, indeed it is mandatory, in relation to a case brought under the common law, to enable either party to take advantage at trial of recent declarations as to the scope of common law defences.

As submitted by learned counsel for the respondents, the defamatory words spoken and published by the appellant which forms the subject matter of the respondents' suit are as follows:

> The ultimate fear about *Ayer Molek* and all of these cases is that they mean Malaysia is going the way of other Asian countries such as Indonesia, Thailand and the Philippines. The implication is that, just like those other countries, Malaysia is becoming a place where justice is now "up for bid."

The above words spoken by the appellant in the natural and ordinary meaning in the context in which they were spoken meant and were understood to mean that the respondents and each of them had connived at, and participated in the corruption, or the attempted corruption, by Dato' VK Lingam of the Malaysian judiciary, in the course of the respondents' litigation against the Ayer Molek Rubber Company Berhad in Malaysia. Therefore, the respondents stand accused of corrupting the Malaysian judiciary and thereby putting Malaysian justice "up for bid". The sting of the article is that the respondents had corrupted the Malaysian judiciary.

In *Lucas-Box v. News Group Newspaper Ltd; Same v. Associated Newspapers Group PLC and Others* [1986] 1 WLR 147, defences were served denying that the articles bore the meanings complained of or that they were defamatory. On their applications more than two years later, the defendants were given leave to amend their defences to plead the truth of the articles. The particulars relied on by the defendants failed to specify the meaning of the words said to be justified. Saville J dismissed the plaintiff's appeal out of time, *inter alia*, against the grant of leave to amend, holding that the rule in libel actions was that defendants ought not to plead the meaning they attached to the words complained of.

It was held in allowing the appeal by the plaintiff that in the absence of any special rule of pleading prohibiting a defendant in a libel action from stating in his defence what he alleged was the ordinary and natural meaning of the words complained of, the ordinary rules of pleading required the parties to define the issues between them and required a defendant relying upon a plea of justification to make clear in the particulars of justification the meaning to be attributed to the words that he was seeking to justify; and that, accordingly, the defendants would be required, as a condition of the grant of leave to amend, so to plead their case that the plaintiff knew clearly what they were purporting to justify.

Ackner LJ said that it is axiomatic that the function of pleadings is to define the issues between the parties, so that both the plaintiff and the defendant know what is the other side's case and thus everyone, counsel, judge and jury, are able to focus upon the real nature of the dispute. Although to some it may seem a startling observation, he can see no reason why libel litigation should be immune from ordinary pleading rules.

In *Wright Norman & Anor v. Oversea-Chinese Banking Corp Ltd* [1994] 1 SLR 513, a recent decision of the House of Lords having come to their notice, the defendants sought to amend their defences so as to introduce a plea of justification. The application was successful before the assistant

registrar but, on appeal, the High Court judge set aside the assistant registrar's ruling and denied leave to amend the defences. The defendants appealed.

In allowing the appeal, the Court of Appeal in Singapore held that the judge erred in exercising his discretion when he treated delay as being decisive. Delay unaccompanied by any resulting hardship or prejudice cannot be a sufficient ground in itself for refusing leave to amend pleadings, although it is a relevant consideration. Other equally, if not more important, considerations were that the application for amendment had been made seven months before the date fixed for trial, that no evidence of bad faith had been shown, that no new facts had been pleaded in support of the plea of justification, that the appellants had undertaken not to seek further discovery, that there was no question of limitation and, most importantly, that it had not been shown that, if leave were granted, hardship or prejudice would be occasioned to the respondents which could not be compensated by costs. Despite the already long history of the litigation, justice clearly demanded that the proposed amendment be allowed so that all relevant issues would be fully canvassed at the trial, whether or not the appellants had been incorrect in failing to raise the defence of justification earlier. At the end of the day, the most important question which the court must ask itself is: are the ends of justice served by allowing the proposed amendment? Pleadings must not be used as a means to punish a party for his errors or the errors of his solicitors.

Learned counsel for the respondents referred to the criteria in the *Yamaha* case and argued that the first criterion that the application is *bona fide* had not been met as the appellant waited for more than three years and while the trial had gone into the stage where the third witness was under cross examination. It must be remembered that the trial judge had initially refused to hear the third application to amend the statement of defence until the trial had proceeded but it was also he who subseuquently was of the opinion that the application should be heard before the trial continued.

Learned counsel maintained that the prejudice caused to the respondents is irreparable and cannot be compensated by costs. He also said that the defamation suit against the respondents has now, with the proposed amendments, turned into a complaint against the Malaysian judiciary. Injustice had been caused to the respondents, he added, as they were concluding their case with a few witnesses left. In any event, a delay of three years is unacceptable when the evidence and particulars were available earlier. Further, a rolled-up plea had already been made in the existing statement of defence.

It was also his contention that a rolled-up plea only contains a defence of fair comment and not the defence of justification. This had been made clear by *Sutherland and Others v. Stopes* [1925] AC 47 which ruled that the plea

in an action for libel that in so far as the words complained of consist of allegations of fact, they are true in substance and in fact and in so far as they consist of expressions of opinion, they are fair comments made in good faith and without malice on a matter of public interest is not a plea partly of justification and partly of fair comment, but is a plea of fair comment only.

Hence, it was his submission that the plea of justification was being made for the first time. He then referred to the particulars proposed to be added in sub-paras. 15.1 to 15.36 of the proposed amended statement of defence.

For paras. 15.1 to 15.27, they relate to the *Ayer Molek* case at all three levels which all occurred in 1995. The appellant had explained the situation in para. 8 of his affidavit dated 2 September 1999 as follows:

> As such, the proposed amendments to the Defence merely provide further particularisation and clarity in comparison to the existing Defence filed and does not propose to alter the character of the suit nor incorporate new facts in any manner inconsistent with the thrust of the existing Defence. The detailed particularisation of the factual representations in relation to the Ayer Molek case (as it appears in paragraph 15.1 to 15.27 of the Proposed Amended Defence) have in actual fact already been pleaded by the defendant in a previous suit related to this present suit involving the same Plaintiffs (Suit No: S4-23-44-1996 *Insas Bhd. & Anor. v. Tommy Thomas & Anor* (hereinafter referred to as the "Previous Suit") and hence does not take the Plaintiffs by surprise for they are aware of such particulars. Moreover, all documents in relation to the Ayer Molek case are already in contention since the Plaintiffs have made this an issue in this proceeding (as apparent in their alleged defamatory meaning attributable to the said words).
>
> In any event, these additional particulars are absolutely essential to my case and is also clearly relevant for it puts forward my case in a clearer and more defined manner. In any case the Plaintiffs would necessarily have to lead/give evidence indicating step by step the manner in which the Ayer Molek case was handled by them or their solicitors and/or related thereto.
>
> I humbly wish to state that by way of the proposed amendments to the Defence, there exists no possibility that the amendments lead to new issues to be tried nor wholly new evidence that has not been anticipated by the Plaintiffs. The particulars seek to properly differentiate the plea of justification and fair comment and further particularise the plea of justification (the Plaintiffs are well alerted as to the specific particulars as they appear in the Previous Suit as mentioned above) which have been already pleaded in the existing Defence with a minor alteration as to the justification meaning relied upon by me.

As for paras. 15.28 to 15.31(A) of the proposed amended statement of defence, they refer to the libel suit between *Tan Sri Dato' Vincent Tan Chee Yioun* and *MGG Pillai and Others*. Paragraph 15.32 of the proposed amended

statement of defence deals with Malaysia Borneo Finance Holdings' suit against the East Asiatic Company. Paragraph 33 thereof refer to the controversial New Zealand photographs taken in 1994. Further, para. 15.34 of the proposed amended statement of defence refers to the poison pen letters of a former judge and Dato VK Lingam's brother. Paragraph 15.35 of the proposed amended statement of defence is a mere reference to s. 8 of the Defamation Act 1957 whereas para. 15.36 relies on particulars in the proposed para. 16 which relate to particulars of comment on other matters. All these, according to learned counsel for the respondents, have no relevance to the matter at hand.

Back to the question posed, when I was a member of the leave panel that framed the question, it was the result of the submissions made at that stage and on the basis of the eight questions raised then namely:

(a) is the three-fold test set out in *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd* [1984] 1 MLJ 213 wherein the Federal Court applied the test in *Kam Hoy Trading v. Kam Fatt Tin Mine* [1963] 29 MLJ 248, a correct interpretation of O. 20 r. 5 of the Rules of the High Court 1980, whose equivalent was the previous O. 28 of the Rules of the Supreme Court 1957?

(b) if the decision of *Yamaha Motor Co. Ltd* had applied the test incorrectly, should not the guiding principle of cardinal importance on the question of amendments be "for the purposes of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings"?

(c) what is the test that a court should apply in defamation cases where a plea of justification is taken especially when the evidence relating to the particulars is discovered subsequent to the filing of the defence?

(d) is the issue of delay a relevant consideration in an application to amend? If so, does 'delay' fall within the *"bona fides"* issue or "prejudice which can be compensated with costs" category expounded in the *Yamaha Motor* case?

(e) should the conduct of the opposing party be looked into in considering an application for amendment, especially on the issue of delay?

(f) where "lack of *bona fides*" or *mala fides* is alleged, where does the burden of proof lie?

(g) should the overall interests of justice in allowing an amendment application to enable the ventilation and determination of the real issues in controversy prevail over any injustice which may be caused by the opposing party? and

(h) in determining the "overall interests of justice" should the court look beyond the scope of the competing interests of the litigants?

Learned counsel for the appellant had highlighted the fact that the Court of Appeal had equated *mala fides* with delay and had found that although the documents in the form of photographs and airline tickets had only been discovered after the pleadings were closed, their argument was that as they were already in fact available in the electronic media did not necessitate investigations to be conducted by the appellant first before putting them in the pleadings. Consequently, they had refused to consider the other criteria in the *Yamaha* case.

The appellant had explained at pp. 8 to 11 of his affidavit dated 2 September 1999 in the following manner:

> 8(b) The delay in making this application to amend the Defence is attributable to the need to make careful comparisons and confirmation of the copies of the documents (related to the evidence in relation to the defences of justification and the plea of qualified privilege) to the original documents. For purposes of safe-keeping some of the copies of the documents were kept overseas making access more difficult and slow. The need to make careful assessment of these documents before considering them as evidence to the pleas stated are obvious as the defences already raised earlier, especially on justification are rather serious in the light of the controversy relating to the Judiciary. Leading cases on this issue have often reiterated the principle that a pleading must not put a plea of justification (or indeed the other related pleas) on record lightly or without careful consideration of the evidence available or likely to become available.
>
> Moreover, there was also the need to confirm and confer some of these documents with the intended witnesses, who are in the country and abroad, confirmation of which has only recently been done as various Official and Non-Official Agencies are involved in certain on-going related investigations.
>
> Yet again, I wish to stress that these are not fresh evidence but documentary evidence in support of what was already pleaded in the existing Defence. However, in order to plead a more detailed Defence, I had to have sight of the documents. The documents have been incorporated into a List of Documents and have been filed in this Honourable Court. A copy of it has already been served on the Plaintiffs on 14-8-1999.
>
> The amendment to the plea of qualified privilege is propelled by the latest Court of Appeal decision of *Albert Reynolds v. Times Newspaper* (1998) which introduces some significant changes to the law in relation to this plea. In fact, this case is pending final decision in the House of Lords. My solicitor has earlier been advised by Senior Counsels in the United Kingdom that the decision of the House of Lords is expected earlier than August 1999. However,

it is now quite clear that the decision of the Reynolds case would probably be made known by the House of Lords only in October 1999. However, the proposed amendments incorporate at present the current position of the law as it stands. Further submissions on this aspect will be forwarded during the Hearing of this application.

9. The proposed Amended Defence in this application will cause no prejudice to the Plaintiffs for the reasons stated in paragraph 8 above, particularly that the Plaintiffs are already aware of the particulars under justification as it was pleaded in the Previous Suit and also the fact that the amendments are in actual fact further particulars of what has already been pleaded in the existing Defence in general terms. The proposed amendments do not seek to adduce fresh evidence in the proceeding for surely the same evidence can and will be adduced based on the existing Defence (which in any case should be anticipated by the Plaintiffs).

On hindsight, considering the course the arguments at the appeal stage had taken, it may have been better if we in the leave panel had agreed to all the eight questions posed then as the drift of the actual question framed, with the sole intention of summarising the situation at hand, was to examine the position where a statement of defence is amended after the pleadings are closed to include a plea of justification where the particulars consist of facts already disclosed in other parts of the original statement of defence and in an earlier suit between the same parties on a similar matter while other particulars had to be verified before the particularised plea of justification could be put in. The question framed is made more necessary by the somewhat unfriendly attitude of the learned High Court judge in handling the matter and the ill-considered finding of the Court of Appeal that the delay is a sure sign of *mala fide.*

I have examined the statement of defence as it was and the proposed amended statement of defence. Guided by the authorities and relying on the submissions made, I can see no prejudice occasioned to the respondents and can find no other reason why the proposed amendments should be disallowed. Should the appellant fail to prove the particulars in the proposed amended statement of defence, then there would be an order of aggravated damages against him.

I would overrule the preliminary objection and allow the appeal but the appellant is to pay costs to the respondents on the amendments. Accordingly, the deposit is to go to the respondents to the account of costs.

Abdul Hamid Mohamad JCA:

Background Of The Case

The appellant before this court was the appellant in the Court of Appeal (W-08-720-99) and the defendant in the High Court (S2-23-42-1996). The respondents (respondents in the Court of Appeal and the plaintiff in the High Court) had filed a suit against the appellant for damages for libel and slander arising from a publication in the International Commercial Litigation Magazine, November 1995 issue, entitled "Malaysian Justice on Trial."

A brief chronology of the proceedings may be useful to get an overall picture of the case.

Writ and statement of claim was filed on 13 June 1996. On 9 September 1996 the appellant filed and served his defence. On 23 September 1996 the respondents filed and served their reply to the defence. In 1997, the respondents took out a summons for direction which was heard and disposed of by October 1997. On 19 March 1999, 20 May 1999 and 7 June 1999 learned counsel for both sides appeared before the learned judge for case management. Directions were given and the matter was fixed for trial starting from 1 September 1999.

On 14 August 1999 the appellant filed an application (the first application, encl. 23) to amend his defence. This application was subsequently withdrawn as it was not supported by an affidavit and also on the grounds that there were some additional minor amendments to be included. On 21 August 1999, a second application to amend the defence was filed (encl. 31A). It was fixed for hearing on 1 September 1999.

During this period the appellant had also made an application to disqualify the judge from hearing the suit. That application was dismissed by the learned judge on 30 August 1999.

On 1 September 1999 the appellant filed a summons in chambers to amend the prayers in encl. 31A. This was fixed for hearing on the same day as encl. 31A.

On 1 September 1999, the learned judge dismissed the summons in chambers. Learned counsel for the appellant then made an oral application similar to that contained in the summons in chambers that had been dismissed. This too was dismissed by the learned judge. Following that the learned judge dismissed the second application to amend the defence.

On 3 September 1999, the appellant filed a fresh summons in chambers (the third application, encl. 43) to amend the same defence. This happened three days before the trial was scheduled to begin. On 6 September 1999, the day

the trial was to begin, learned counsel for the appellant made an application for an adjournment of the trial, one of the grounds for which was that encl. 43 should be determined before the trial commenced. The application was refused by the learned judge. The trial commenced and continued on the following day. On that day (7 September 1999), in the course of the cross-examination of the respondents' third witness it became apparent to the court that it was necessary for the application for amendment (encl. 43) to be heard first. The learned judge fixed encl. 43 for hearing on the following day. So, on 8 September 1999 encl. 43 was heard and dismissed with costs. The appellant appealed to the Court of Appeal.

The Court of Appeal dismissed the appeal on 23 September 2000. On 28 March 2001, the Federal Court granted the appellant leave to appeal to this court. The court also gave leave to the appellant to file and serve a notice of appeal within seven days of the order and that all proceedings in the High Court action be stayed pending the hearing and final disposal of the appeal.

The appeal was fixed for hearing on 13 May 2002.

Notice Of Motion

On 9 March 2002, the respondents filed a notice of motion, praying for orders, *inter alia,* that the order of the Federal Court dated 28 March 2001 granting leave to the appellant to appeal to the Federal Court be set aside, that the said application for leave be reheard by a newly and differently constituted panel of the Federal Court.

However, on the day fixed for the hearing the notice of motion and the appeal (13 May 2002), the respondent withdrew the application. We allowed the application to withdraw the notice of motion. However, after hearing learned counsel for the appellant and the respondents we reserved our decision on the issue of costs.

On costs of the notice of motion, Dato' V. Sivaparanjothi for the respondents informed the court that the respondents had, by a letter dated 7 May 2002 (six days before the date fixed for the hearing of the notice of motion) written to the registrar of the Federal Court, with a copy to the appellant's solicitors, that the respondents were withdrawing the notice of motion. Learned counsel for the respondent submitted that the proper order for the court to make regarding costs is that the costs be taxed and paid to the appellant.

However, Dato' Muhammad Shafee Abdullah, the learned counsel for the appellant asked the court to award costs on "indemnity basis". He cited the case of *Lownds v. Home Office* [2002] EWCA Civ. 365. That is a decision of the Court of Appeal of England (Civil Division).

Another decision of the same court, *Kiam v. MGN Ltd. (No. 2)* [2002] EWCA Civ. 66; [2002] 2 All ER 242 was also referred to by the learned counsel.

It is very clear from the judgment of Woolf CJ (delivering the judgment of the court) in *Lownds v. Home Office*, that the judgment was based on the specific provision of the (English) Civil Procedure Rules 1998. As the judgment clearly says:

> Part 44.4 provides for two basis of assessment. The first is the standard basis and the second is the indemnity basis.

The factors which the court may take into account when assessing costs on the standard basis and on the indemnity basis are specifically provided in Part 44.5.

As this court is not governed by those provisions in the (English) Civil Procedure Rules 1998, I do not think it is necessary to reproduce those provisions and discuss them in detail. All that need be said, perhaps, is the distinction between the two. In assessing costs on the standard basis only "costs which are proportionate" are allowed. On the other hand, when costs are assessed on an indemnity basis there is no requirement of proportionality.

It was not shown to us, neither could I find a similar provision in either the Rules of the Court of Appeal 1994 (RCA 1994) or the Rules of the High Court 1980 (RHC 1980).

In my view, this court is bound by the provisions of our own Rules and not that of any other country. It is a matter for the Rules Committee established under s. 17 of the Courts of Judicature Act 1964 whether or not to make such rules. It is not for this court to usurp the functions of the Committee.

Furthermore, this court too should be careful and slow to adopt the decisions of the courts in other countries, even on the basis that it forms parts of the common law of England, which on this point, it is not. Particular attention must be paid to the written law of this country. In other words, the provisions of s. 3(1) of the Civil Law Act 1956, must always be borne in mind.

In this case, applying the principles of taxation as embodied in our law, written and case law, the proper order that the court should make is that the costs arising from the filing the notice of motion by the respondents should be taxed as provided for under our Rules and paid to the appellants.

The Appeal

The Proposed Amendments

So as not to lose our focus, it is important to state briefly the proposed amendments and the grounds relied on by the appellant in support of the application.

First, the proposed amendments. It is too long to reproduce it in this judgment. However, basically, as stated in the appellant's submissions, para. 18:

> ... the Appellant, would advance separate and district plea of justification and of fair comment in place of the "rolled-up plea". As such, by the proposed amendment, the Appellant seeks to plead justification under "new" paragraph 15 and fair comment under "new" paragraph 16."

In the new para. 15 which consists of 36 sub-paragraphs the appellant seeks to introduce particulars pertaining to the "*Ayer Molek* Case" and the "*Vincent Tan"* case.

In para. 16 which consists of 15 sub-paragraphs, the appellant seeks to introduce particulars pertaining to the "Wee Choo Keong" election petition; the contempt of court case against Wee Choo Keong by MBf Holdings Berhad and MBf Finance Berhad; particulars pertaining to the corruption charge against a former magistrate, Thavanathan; particulars pertaining to the failure to charge Tan Sri Abdul Rahim Thamby Chik ("Rahim"), the former Chief Minister of Malacca for having sex with an underaged girl and the fact that 15 other men were charged; particulars about the charges against Rahim for corruption that were subsequently withdrawn; particulars concerning the death of one Lee Quat Leong while under police detention in which, it was alleged, that "only 2 low ranking police officers were charged. Both police officers pleaded guilty and were given relatively light sentence".

The affidavit in support of the application for amendment was filed by the appellant. Regarding the proposed amendment to para. 15 of the defence, the appellant explained:

> Paragraph 15 under the proposed amendment to the Defence seeks to adumberate further particularisation in support of the justification meaning already present in the existing Defence. Furthermore, the proposed amendment also maintains separate defences of justification and fair comment instead of the rolled up plea forwarded in the existing Defence.
>
> As such, the proposed amendments to the Defence merely provide further particularisation and clarity in comparison to the existing Defence filed and does not propose to alter the character of the suit nor incorporate new facts in any manner inconsistent with the thrust of the existing Defence. The detailed particularisation of the factual representations in relation to the *Ayer Molek* case (as it appears in paragraph 15.1 to 15.27 of the Proposed Amended Defence) have in actual fact already been pleaded by the defendant in a previous suit related to this present suit involving the same Plaintiffs (Suit No: S4-23-44-1996 *Insas Bhd. & Anor. v. Tommy Thomas & Anor* (hereinafter referred to as the "Previous Suit")) and hence does not take the Plaintiffs by surprise for they are aware of such particulars. Moreover, all documents in relation to the

Ayer Molek case are already in contention since the Plaintiffs have made this an issue in this proceeding (as apparent in their alleged defamatory meaning attributable to the said words).

Regarding the delay in making the application, the appellant explained:

(b) The delay in making this application to amend the Defence is attributable to the need to make careful comparisons and confirmation of the copies of the documents (related to the evidence in relation to the defences justification and the plea of qualified privilege) to the original documents. For purposes of safe-keeping some of the copies of the documents were kept overseas making access more difficult and slow. The need to make careful assessment of these documents before considering them as evidence to the pleas stated are obvious as the defences already raised earlier, especially on justification are rather serious in the light of the controversy relating to the Judiciary. Leading cases on this issue have often reiterated the principle that a pleading must not put a plea of justification (or indeed the other related pleas) on record lightly or without careful consideration of the evidence available or likely to become available.

Moreover, there was also the need to confirm and confer some of these documents with the intended witnesses, who are in the country and abroad, confirmation of which has only recently been done as various Official and Non-Official Agencies are involved in certain on-going related investigations.

Yet again, I wish to stress that these are not fresh evidence but documentary evidence in support of what was already pleaded in the existing Defence. However, in order to plead a more detailed Defence, I had to have sight of the documents. The documents have been incorporated into a List of Documents and have filed in this Honourable Court. A copy of it has already been served on the Plaintiffs on 14.8.1999.

The Executive Director of the plaintiffs filed an affidavit in reply. I shall only reproduce those parts which are more relevant to this judgment.

8(k) … the proposed amendments to the Defence in fact leads to new issues being raised by the Defendant.

9. ….

(a) there is an inordinate delay in making the said Application by the Defendant which causes serious prejudice and detriment to the Plaintiffs;

(b) the said Application for amendment is being made after the trial has commenced and the Plaintiffs' third witness (myself) is under cross examination by the Defendant's Counsel;

(c) the Defendant's explanation that the delay is attributable to the need to make comparisons and confirmation of the copies of the document to the original documents are mere allegations not supported by evidence. In any event a Defendant does not take more than three (3) years just to compare and confirm documents;

(d) it also does not take more than three (3) years to compare and confirm documents just because they are alleged to be kept overseas unless the place in which the documents are kept is inaccessible by modern transportation;

(e) similarly it does not take a Defendant more than three (3) years to make assessment of documents. Further, there is no controversy relating to the judiciary as alleged by the Defendant in Paragraph 8(b) of the said Affidavit (page 9);

(f) it is true that it is a principle of law that a Defendant must not put a plea of justification on the record lightly or without careful consideration of the evidence available or likely to become available but that principle of law does not apply to the circumstances of our case;

(g) it also does not take more than three (3) years to confirm and confer documents with intended witnesses and the deponent of the said Affidavit had not disclosed the alleged "various Official and Non-Official Agencies" and the "certain on-going related investigations" as stated in Paragraph 8(b) of the said Affidavit (at page 9);

(h) further, the matters deposed to in Paragraph 8(b) of the said Affidavit are mere allegations not supported by evidence;

11. …

(c) the alleged particulars the Defendant seek to include in the proposed Amended Defence are matters which allegedly took place in 1994 and 1995;

(d) therefore there is an inexcusable and inordinate delay on the part of the Defendant in filing the said Application. As stated in Paragraph 9 above, the purported reasons for the delay in filing the said application as stated in the said Affidavit are wholly misconceived and untenable in law. This is a clear tactical manoeuvre by the Defendant to delay and derail the trial of this action by filing an application at such a late stage of the proceedings to the serious detriment and prejudice of the Plaintiffs;

The Judgment Of The High Court

From the judgment of the learned High Court judge, it is clear that the learned judge dismissed the application because no exhibits were attached to the affidavit in support of the application. This is what the learned judge said:

> To a question by the Court whether the defendant had attached any exhibits to his affidavit to back up his allegations, Encik Shafee's response was there are no exhibits attached because there is no necessity …
>
> To my mind the defendant has failed to show a basis to seek the amendment. Whilst affirming an affidavit he has totally failed to exhibit any documents that support his prayer for amendment. Without the exhibits how is the Court to know the basis of the defendants' allegations. In his affidavit at para 2 the defendant has admitted having "records" to which he has access on which the affidavit was based. Where are those records? What are those records? ... I hold the omission as deliberate because there are no such records or original records. If there were they would have been produced …

The second ground, which was dealt under "Merits" appears to have been summed up by the learned judge in the penultimate sentence of his grounds of judgment:

> There is total lack of merit in this application which lacks *bona fide.*

Why was there "a total lack of merits"? This appears to relate to the statement by the appellant that he had to keep some of the documents overseas for safe keeping. The learned judge viewed such a suggestion as "tarnishing the image of this beautiful country. It suggests that nothing is safe, when such is totally false and a mischievous suggestion at that to make."

The learned judge continued:

> Assuming this is true, i.e. that some documents were kept overseas, what were they. This Court must be shown the documents and they must be identified to satisfy the Court that the contention of the defendant that it is unsafe to keep these documents in this country is true. No such affidavit evidence has been led. Mr. Raphael Pura's allegation that it is not safe to keep documents in this country is a very serious accusation that must be met with the clearest evidence from him. Otherwise it could lead to a suggestion of *mala fide* on the part of the defendant.
>
> Now asuming the documents were top secret material that had to be secreted overseas for safe-keeping then clearly on the defendant's own admission such documents fall under the Official Secrets Act. No one can disclose these even in Court. So therefore any amendment sought that requires the admission of such documents will have no leg to stand on in any case.
>
> On the other hand, if the said documents do not fall under the OSA then what is so secret about these documents that they could not be produced much earlier during the case management stage. In any case if the defendant feared for the safety of the original documents, all that is needed during the case management is to only tender photostat copies of such documents. The defendant could have given an undertaking to the Court to produce the originals at the trial. If there is a will, there is always a way.

> In any case the defendant's own contradictory affidavit in support of this application shows the total lack of merit in this application. The defendant has admitted that what is sought to be admitted is not fresh evidence and that they have been raised in an earlier suit. Whilst the defendant has not identified the suit, I am satisfied that the defendant is satisfied that the amendments sought have been already raised in another suit. If that be the case then the defendant's earlier averment that he could not amend earlier because he had to interview the witness and compare documents and secrete the documents for safekeeping overseas are all untrue. There is total lack of merit in this application which lacks *bona fide*.

Those were the grounds on which the learned judge dismissed the application.

The Judgment Of The Court Of Appeal

It is important to note that before the appeal was heard by the Court of Appeal, a motion was filed by the appellant praying, *inter alia*, for an order that the appellant be granted an extension of time to file and serve a Supplementary Records of Appeal incorporating the documents within the Common Agreed Bundle of Documents marked as "CABD3" filed in the High Court. This application ("regarding "CABD3") was disallowed by the Court of Appeal.

The Court of Appeal then went on to consider the appeal on merits. The judgment of the Court of Appeal dealt with the law relating to amendments of pleadings. As it is not very long, for easy reference, perhaps it should be reproduced:

> The provision relating to amendment of the writ and pleadings is governed by Order 20 rule 5 of the Rules of the High Court 1980. It is trite that amendments can be made at any stage of the proceedings including at the trial. The general principle is that the court will allow such amendments as will cause no injustice to the other parties. It is equally trite if the application is allowed, the opposite party will normally be compensated by way of costs. Be that as it may, the Federal Court, the apex court of this country, had the occasion to consider and interpret Order 20 rule 5. It is the case of *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. & Ors.* [1983] 1 MLJ 213 where the Federal Court set out three basic questions for consideration, *viz:*
>
> (1) whether the application is *bona fide*;
>
> (2) whether the prejudice caused to the other side can be compensated by costs; and
>
> (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

As we are here dealing with the application for the amendment of defence, question (1) above would be relevant for consideration. If it is allowed, if follows that the other party should be compensated by costs.

This court similarly had considered Order 20 rule 5 *Taisho Co. Sdn. Bhd. v. Pan Global Equities Bhd.* [1999] 1 MLJ 359. In *Taisho*'s case, the amendments relate to the amendment of the statement of claim. Be that as it may, the questions posed in Yamaha would still be equally applicable to the present appeal before us. If the application of the appellant, on the facts before the learned judge, showed lack of *bona fide* then he fails in his application altogether. It is then for the appellant asking the court to exercise a discretionary power in his favour to place some material and advance some cogent reasons to impel the court to lean on his side (see *Multi-Pak Singapore Pte. Ltd. (In receivership) v. Intraco Ltd. & Ors* [1992] 2 SLR 793; [1993] 2 SLR 113).

The learned judge in his judgment at page 45 of the Appeal Record ruled "There is total lack of merit in this application which lacks *bona fide*". Lack of *bona fide* or put it another way, *mala fide* is very much a ground in considering an application for amendment under Order 20 rule 5 (see also *Hock Hua Bank Bhd. v. Leong Yew Chin* [1987] MLJ 230). We then need to examine the material placed before him and whether cogent reasons were advanced by the appellant for the court to exercise its discretionary power in his favour.

The court then considered the "*bona fide* issue" and concluded:

We may not wholly agree with the approach the learned Judge took in dealing with the application when he asked the appellant's counsel to address him on 5 issues. With respect, he should be guided by the principle set out in the Yamaha case. We may also not totally agree with his reasons on the bona fide issue. However, we agree with his conclusion on the lack of *bona fide* on the part of the appellant in his application. We were satisfied that on the affidavit evidence there was insufficient material placed before him and even if there was sufficient material no cogent reasons were advanced by the appellant. The learned Judge had, in our view, correctly exercised his judicial discretion in dismissing the application which borders on lack of *bona fide*. If the appellant fails on this ground, he fails altogether.

There were no compelling grounds for us to interfere with the exercise of his discretion with the exception of the amendment too the title, rewording of the parties and paragraphs 3.1 and 3.3, where we allowed them as they are merely formal. However, the appeal was dismissed with costs. The deposit to go to the respondents towards their taxed costs.

Leave Of The Federal Court

Pursuant to an application for leave to appeal to this court, this court, on 28 March 2002, made the following order:

IT IS HEREBY ORDERED that the Application for leave to appeal to the Federal Court be allowed with costs on the second issue which is re-worded as follows:- "What is the proper test the Court should apply in defamation cases where application for amendments are made to include a plea of justification in the defence when the evidence relating to these particulars are discovered after the Pleadings are closed.

Preliminary Objection

The appeal was fixed for hearing on 13 May 2002. On 7 May 2002, learned counsel for the respondent wrote to the registrar informing the court that at commencement of the hearing of the appeal, the respondent would "take a preliminary objection and invite the honourable court to consider the following matters/issues:

(A) the question/issue for which leave was granted is not a matter/issue that arose or was decided by the High Court in the exercise of its original jurisdiction and/or by the Court of Appeal;

(B) consequently, the Federal Court did not have jurisdiction to grant leave. Accordingly, the leave granted should be withdrawn/set aside and/or the aforesaid appeal ought to be dismissed;

(C) the question for which leave was granted is hypothetical and/or an academic question; and

(D) consequently, the Federal Court should decline to answer the question and the aforesaid Appeal ought to be dismissed.

I shall now deal with the preliminary objection first.

Learned counsel for the respondents argued that the question posed by the Federal Court did not arise from or was not decided by the High Court or the Court of Appeal. Referring to the question posed by the Federal Court (reproduced earlier) he stressed on the words "when the evidence relating to these particulars are discovered after the pleadings are closed." The learned counsel submitted that the appellant's case at the High Court was quite opposite from the question posed by this court. The appellant had clearly stated in his affidavit that the proposed amended defence "are not fresh evidence but documentary evidence in support in what was pleaded in the existing defence". The appellant further admitted in the said affidavit that "the existing defence filed and does not propose to alter the character of the suit nor incorporate new facts in any manner inconsistent with the thrust of the existing defence. The detailed particularisation of the factual representations in relation to the *Ayer Molek* case (as it appears in paras. 15.1 to 15.27 of the proposed amended defence) have in actual fact already been pleaded by the defendant in a previous suit related to this present suit involving the same plaintiffs."

The learned counsel for the respondents went on to argue that this court had no jurisdiction to grant leave as per question posed and urged this panel to set aside the leave granted by the earlier panel or, alternatively, to decline to answer the question posed as it is academic. The learned counsel for the respondents submitted that the question posed did not arise from the judgment of the Court of Appeal in respect of a cause or matter decided by the High Court in the exercise of its original jurisdiction. He referred to s. 96(a) of the Courts of Judicature Act 1964, the cases of *Lam Kong Co. Ltd. v. Thong Guan Co. Pte. Ltd.* [2000] 4 CLJ 769 FC, *Capital Insurance Bhd. v. Aishah bte. Abdul Manap & Anor* [2000] 4 CLJ 1 FC, *The Minister for Human Resources v. Thong Chin Yoong and Another Appeal* [2001] 3 CLJ 933 FC, *Megat Najmuddin bin Dato' Seri (Dr.) Megat Khas v. Bank Bumiputra (M) Bhd.* [2002] 1 CLJ 645; [2002] CLJ JT(2) FC.

The first question that arises from this submission is whether, the leave having been granted by this court and now that this court (this panel) is constituted to hear the appeal, this court (this panel) should allow the respondents to reopen the issue whether the leave should have been granted or not.

Generally speaking, it should not. The issue has been decided by this court. It is *res judicata*. A party should not be given a second bite of the cherry. A new panel of this court should not be reversing the decision of the earlier panel of the same court. There should be consistency in the judgment of the court.

However, where the granting of the leave is challenged on the ground of lack of jurisdiction, this court has held that the granting of the leave to appeal to this court may still be challenged even at the hearing of the appeal.

In *Capital Insurance Bhd.*, during the hearing of the appeal from the High Court to the Court of Appeal, a preliminary objection was raised in the Court of Appeal that the record of appeal was bad in law and ought to be set aside for non-compliance with r. 18(4)(d) and 18(7) of the Rules of the Court of Appeal 1994. The Court of Appeal upheld the preliminary objection and dismissed the appeal. During the hearing of the application for leave to appeal to the Federal Court, a preliminary objection was raised that the application for leave was improper. The preliminary objection "was summarily dismissed." At the hearing of the appeal, the respondent raised a preliminary objection in respect of the jurisdiction of the Federal Court to hear the appeal. It was submitted that the subject matter of the appeal was not from the judgment of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction. Mohamed Dzaiddin FCJ (as he then was) delivering the judgment of the court said, *inter alia*:

Since the preliminary objection relates to the question of jurisdiction of the Federal Court to hear appeals from the Court of Appeal, and noting that at a leave stage the preliminary objection taken by the respondents that the leave application was improper was summarily dismissed by this court, the respondents are entitled to raise this preliminary objection and this court can entertain the application.

In *The Minister for Human Resources* the High Court issued an order of certiorari to quash the decision of the Minister made under s. 20(2) of the Industrial Relations Act 1967. The High Court held that the Minister erred in the exercise of his discretion under s. 20(3) of the Act in declining to refer the representations of the claimant to the Industrial Court. The Federal Court granted leave to appeal and framed the following question for its determination: 'Whether the employer can suspend an employee without loss of pay, benefits and perks pending the conclusion of the investigations and inquiries into his conduct notwithstanding that this is not stated in the terms of employment'. At the hearing of the appeal the claimant raised a preliminary objection that the question as framed did not come within the meaning of s. 96(a) of the Courts of Judicature Act 1964 ('the CJA') and hence the appeal should be dismissed forthwith.

Held, allowing the preliminary objection:

(1) The High Court and the Court of Appeal did not consider the issue of suspension except to say that it may be relevant for the purpose of determining whether the claimant was entitled to declare that he was constructively dismissed. This issue involved mixed questions of law and fact for the Industrial Court. Further, the question as framed seems to indicate that it was a point of law in which case then the proper forum to consider would be the Industrial Court. Hence, the Minister erred in the exercise of his discretion under s. 20(3) of the Act (see p 231C-D).

(2) The Federal Court was asked to consider an issue which was not determined by the High Court as well as the Court of Appeal. To that extent the proper order that the court should make would be to decline to answer the question. It is best that the issue of suspension be considered by the Industrial Court in determining whether the claimant was dismissed without just cause or excuse. In the circumstances of the case the court agreed with the preliminary objection that the question framed by this court for its determination did not come within the ambit of s. 96(a) of the CJA (see p 231E-G).

So, at least in those two cases this court has allowed the issue to be raised by way of a preliminary objection at the hearing of the appeal. In the circumstances I accept that the respondents in the present case may be allowed to raise this issue at this stage even for the first time.

So the question is whether this appeal falls outside the ambit of the provisions of s. 96(a) of the Courts of Judicature Act 1964?

In answering this question, the following points should be noted. In *Lam Kong Co. Ltd.*, the judgment under appeal was the decision of the Court of Appeal made in an application filed in the Court of Appeal. In other words the application itself originated in the Court of Appeal. In the present appeal the application for amendment was made in the High Court. Against the order of the High Court there was an appeal to the Court of Appeal. It is against the judgment of the Court of Appeal in that appeal from the High Court that the appellant appealed to the Federal Court. In that respect *Lam Kong Co. Ltd.* is distinguishable from the present appeal.

Capital Insurance Bhd. can also be distinguished on the same ground. There too a preliminary objection was raised in the Court of Appeal that the record of appeal had not complied with r. 18(4)(d) and 18(7) of the Rules of the Court of Appeal 1994. In other words, the matter originated in the Court of Appeal.

It is the same with *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas.*

However, *The Minister for Human Resources* is different. It is in fact similar to this case. In that case, the matter (application for *certiorari*) originated in the High Court. There was an appeal to the Court of Appeal and subsequently to the Federal Court. But, it was the issue posed by the Federal Court in granting the leave to appeal to the Federal Court that was challenged as falling outside the ambit of s. 96(a) of the Courts of Judicature Act 1964, as the issue was not an issue decided by the High Court or the Court of Appeal. The issue determined by the High Court and confirmed by the Court of Appeal was whether the Minister had erred in the exercise of his discretion under s. 20(3) of the Industrial Relations Act 1967. However, the Federal Court, in granting leave to appeal framed a question on the right of the employer to suspend the employee pending the conclusion of an investigation against him. The Federal Court in that case declined to answer the question posed.

Initially, I thought that the Federal Court, being the highest court in the country, should have some flexibility to frame questions for the appeal when granting leave to appeal. By that I mean that this court is free to frame questions for appeal thereto so long as the questions are connected with or arising from the case (ie, the suit, application, etc.) that had commenced in the High Court and subsequently went on appeal to the Court of Appeal. In other words, it is not restricted to issues decided by the High Court. This is because, quite often, the case takes a different turn during the argument of the appeal at the Court of Appeal. However, this court, in *The Minister for*

Human Resources, appears to have adopted the more restrictive view. I am quite reluctant to differ and I accept it as the law, first, for the sake of consistency and, secondly, there may be greater wisdom in it eg, it is more consistent with the principle that a party is bound by its pleadings.

So, the question is whether, in this case, the issue posed, is one that was decided in the High Court. To answer this question, we will have to go back to the application for leave to amend the defence, the affidavit in support of the application, the judgment of the learned High Court judge and the question posed.

As was reproduced earlier, the main purpose of the amendment was to separate the roll-up plea of justification and fair comment.

The High Court dismissed the application on the ground that no exhibits were attached to the affidavit in support of the application, that there was "a total lack of merits in this application which lacks *bona fide*." The Court of Appeal dismissed the appeal on the ground that "there was insufficient material placed before the learned judge and even if there was sufficient material no cogent reasons were advanced by the appellant"; and that there was a lack of *bona fide* on the part of the appellant. The question posed refers to no such issue. It relates to the test applicable where the evidence relating to the particulars are discovered after the pleadings are closed. So, on the authority of the judgment of this court in *The Minister for Human Resources*, this court should decline to answer the question posed.

However, in this case, there is yet another strong ground on which this court should also decline to answer the question posed. And, that is, the question posed does not relate to the facts of the case and is academic.

It must be remembered that the question posed is the proper test applicable "where the evidence relating to these particulars are **discovered after** the pleadings are closed." (emphasis added).

Was the evidence relating to the particulars of the proposed amended defence discovered after the pleadings were closed?

The respondents' reply to the appellants defence was filed on 23 September 1996. Pursuant to O. 18 r. 20 of the Rules of the High Court 1980 pleadings are deemed to be closed at the expiration of 14 days after the service of the reply, in any event, as early as 1996.

The appellant's own affidavit in support of the application said in para. 8(a):

> … the proposed amendments to the Defence merely provide further particularization and clarity in comparison to the existing Defence filed and does not propose to alter the character of the suit nor incorporate new facts in any manner inconsistent with the thrust of the existing Defence. The detailed particularization of the factual representations in relation to the *Ayer Molek* case (as it appears in paragraph 15.1 to 15.27 of the Proposed Amended Defence) have in actual fact already been pleaded by the Defendant in a previous suit related to this present suit involving the same Plaintiffs (Suit No: S4-23-44-1996 *Insas Bhd & Anor v. Tommy Thomas & Anor* [hereinafter referred to as the "Previous Suit"]) and hence does not take the Plaintiffs by surprise for they are aware of such particulars.

In para. 8(b):

> Yet again, I wish to stress that these are not fresh evidence but documentary evidence in support what was already pleaded in the existing Defence.

In para. 9:

> The Proposed Amended Defence in this application will cause no prejudice to the Plaintiffs for the reasons stated in paragraph 8 above, particularly that the Plaintiff's are already aware of the particulars under justification as it was pleaded in the Previous Suit and also the fact that the amendments are in actual fact further particulars of what has already been pleaded in the existing Defence in general terms. The proposed amendments do not seek to adduce fresh evidence in the proceeding for surely the same evidence can and will be adduced based on the existing Defence (which in any case should be anticipated by the Plaintiffs).

In para. 10(c):

> there is no likelihood of fresh evidence led on issues which may arise as a result of the amendments simply because the same issues do exist within the pleaded meaning of the existing Defence, *albeit* in a general manner.

(It should be noted that the statements contained in the affidavit of the appellant that some of the documents were kept abroad, that time was needed to make careful comparison and confirmation of the copies of the documents with the original documents, the need to make careful assessment of the documents etc. are reasons given for the delay in making the application. They have nothing to do with discovery.)

So, from the appellant's own affidavit, it is clear that the evidence relating to these particulars were not discovered after the pleadings were closed. To answer the question would be purely an academic exercise. That is not the function of this court.

In *Syed Kechik bin Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors. and Another Application* [1997] 1 MLJ 257 (FC), Edgar Joseph Jr. FCJ, said:

> Having said that, this Court does not sit to decide abstract or academic or hypothetical questions of law regarding which the parties are not in dispute. Thus, in *Ainsbury v. Millington* [1987] 1 All ER 929, Lord Bridge said this (at pp 930-931):
>
> It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.

In *Sun Life Assurance Company & Canada and Jervis* (1994) The Law Reports Appeal Cases, p. 111, Viscount Simon LC, speaking for the House of Lords, said:

> … I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties.

In *Ainsbury v. Millington* [1987] 1 All ER 929 (HL), Lord Bridge, having cited the passage by Viscount Simon LC above, said:

> It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.

In *Loknath Padhan v. Birendra Kumar Sahu* [1974] AIR 505, the Supreme Court of India held:

> It is well-settled practice recognized and followed in India that if an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties, it would be waste of public time and indeed not proper exercise of authority for the Court to engage itself in deciding it.

Justice Bagwati, in his judgment, said:

> … it would be clearly futile and meaningless for the Court to decide an academic question, the answer to which would no affect the position of one party or the other. The Court would not engage in a fruitless exercise. It would refuse to decide a question, unless it has a bearing on some right or liability in controversy between the parties. If the decision of a question would be wholly ineffectual so far as the parties are concerned, it would be not only unnecessary and pointless but also inexpedient to decide it and the Court would properly decline to do so.

The appellant too does not come to this court to know what the law is in this country on a hypothetical issue. The appellant wants his proposed amendments to be admitted. But, even if this court were to answer the question posed in a way that he would like this court to answer, still this court would not be able to make the order that he requires. That is because the facts of the case, as stated by him, are materially different from the facts that form the basis of the answer.

In the circumstances, following, in particular the decision of this court in *The Minister for Human Resources* I would decline to answer the question. I would dismiss the appeal with costs without considering the merits.

My learned Chief Judge (Sabah and Sarawak) has seen this judgment in draft and agreed with it.